On the other hand, Federal Counsel argues that there had been factually no sale, as the only sale contemplated was in the eventuality of an abandonment of the scheme, and the fact remains that the scheme was successfully completed.

It is common ground that this was insofar as the taxpayer is concerned a single transaction. I bear in mind that an isolated transaction can be a trade, see, *inter alia*, Rowlatt J. in *Martin* v. *Lowry*.[2] In this single transaction, the taxpayer had played no part except to be a party to the agreement and to receive an amount which consisted of a sum certain representing the expressed sale price of the land to the syndicate and a half of the profits, which together came up to the price he demanded for the land. He had only a right to examine the accounts. This was clearly to preserve his interests in the sum he would be getting. However the "full and complete and unrestricted power and right of management of the syndicate" was in clause 9 reserved only to the developers, without any interference from the taxpayer. The provisions reserved for performance on the part of the syndicate were financial and clearly meant for the purpose of the computation of the profits. In this computation of profits no interest was chargeable to the syndicate on the moneys advanced by the developers, on whom the full burden of making the financial provisions fell. The taxpayer did not have to provide a single cent. Neither was he liable for loss, if any. In such an event, he would still be entitled to the sum certain for the land.

It is in these circumstances that the taxpayer characterises the transaction to be one for sale of his land to the developer. But of course the agreement remains to be construed and on a proper construction, and having regard to all the surrounding circumstances of the case and to the law so adequately canvassed, if I may so put it with every respect, in the judgment of Gill F.J. in *E.* v. *Comptroller-General of Inland Revenue*,[3] a judgment of the Federal Court, the transaction so far as the taxpayer is concerned is an adventure in the nature of a trade.

I adopt with respect the concluding words of Gill F.J.:

"In the final analysis the answer to this appeal is fairly simple. The transaction by the appellant in this case must be taken as an isolated transaction. As an isolated transaction, it was an adventure in the nature of trade. In the absence of a definition of 'trade' extending that term to an adventure in the nature of trade, as the English Income Tax Acts do, this single transaction did not constitute a trade of the appellant within the meaning of section 10(1)(a) of the Income Tax Ordinance, 1947. As it was but a single business transaction carried out by the appellant and not part of a business carried on by him, it did not constitute the business of the appellant either within the meaning of the same section. The profit arising therefrom is therefore not subject to tax under that section."

I also accept, with respect, the correction of the error made by me in *E's* case at first instance and at page 122 my appreciation of *Eames* v. *Stepnell Properties Ltd.*[4]

In this latter case, the acquisition of land with the intention of selling at a profit and sale after active steps were taken such as obtaining planning permission and conversion from agricultural land to residential development was held to be an adventure in the nature of a trade.

I therefore take the view that on the facts of this case, the transaction was a sale of property with a provision for an enhanced price and therefore factually an adventure in the nature of a trade.

The appeal is allowed with costs. The order of the Special Commissioners is set aside.

Appeal allowed.

Solicitors: *Lim Kean Siew & Co.*

L.K.C. v. COMPTROLLER-GENERAL OF INLAND REVENUE

[A.C.J. — (Chang Min Tat J.) March 28, 1973]

[Penang — Originating Motion No. 1 of 1972]

Income Tax — Sale by rubber tapper of lands belonging to him in order to invest in other pieces of land — Multiple transactions — Whether constitute dealing in land — Whether profits liable to tax.

The appellant was a rubber holder and rubber tapper. He bought certain rubber lands in 1960, 1961 and 1963 and tapped on the lands. In 1966 he sold fifteen lots of the land in various transactions, making in all a profit of $107,957. Subsequently, in the same year, he bought three portions of a rubber estate in Penang. The appellant was assessed to tax in respect of the profits, and his appeal to the Special Commissioners was dismissed. He appealed to the High Court and contended that the profits represented capital appreciation.

Held: the sale in this case was a sale of capital assets and the difference in price, an appreciation which at law was not caught by tax.

Per Chang Min Tat J.: "It is to my mind clear that what the appellant did was to sell and invest the proceeds in other pieces of land. The sale of lands in question within a very short space of time for the clear purpose of reinvestment must in the circumstances of this case take away any significance of multiple transactions."

Cases referred to:

(1) *E.* v. *Comptroller-General of Income Tax* [1970] 2 M.L.J. 117.

(2) *Pickford* v. *Quirkes* 13 T.C. 251.

(3) *Macmahon and Macmahon* v. *Commissioners of Inland Revenue* 32 T.C. 311.

(4) *Hudson's Bay Co.* v. *Stevens* 5 T.C. 424.

(5) *Evans* v. *F.C. of T.* (1936) 55 C.L.R. 80.

CASE STATED.

I. K. Cheah for the appellant.

Mohamad Nizar bin Idris, Federal Counsel, for the respondent.

Chang Min Tat J.: This is an appeal by the taxpayer from the decision of the Special Commissioners confirming the assessment of the profits derived from the sale of 15 lots of land in Sitiawan as income assessable to income tax on the basis that the taxpayer was trading in land.

In the case stated, the facts found by the Special Commissioners were as follows:

The appellant began to tap rubber when a boy. In 1970 he was 57 years old and resided in the locality in which the lands were situate. Since 1 September 1952 he carried on business trading in sundry goods as the sole proprietor. The business was registered with the Registrar of Business.

He commenced buying rubber lands in 1951. He purchased 2 lots (lots 2156 & 2157) in 1951 and lot 2786 in 1956. He tapped the rubber trees thereon and also replanted. During the immaturity of the replanting, he planted other catch crops. These lands he still retains. They are not the subject matter of the present dispute.

In 1960, he purchased in all some 14 lots of rubber land, of which twelve were fragmented parts of an estate. In 1961, he also purchased an undivided share in one lot of rubber land and in 1963, two other lots. With the exception of lot 2786 purchased in 1960, all these 15 lots of land were sold by the taxpayer in 1966, making in all a profit so far as I can add up the figures, of $107,957.

In 1966, the taxpayer purchased 3 portions of Menteri Estate in Triang, Pahang of a total area of 190.748 acres for $149,081, and on 5 September 1968, he purchased a part of New Columbia Estate in Sitiawan of an area of 49.18 acres for $24,590.

His land transactions can best be seen in the following table:—

Year	*Lot*	*Area A.R.P.*	*Price Paid*	*Date Sold*	*Amount rec'd.*	*Profit*
1951	2156	3.0.36	$6-700 p.a.			
	2157	3.0.0				
1956	2786	5.0.08				
1960	2150	3.0.10				
	1607	5.09½ ac.	$ 11,000	16.4.66	$14,206	+$ 3,266
	12823	3.1.09)		30.4.66	$ 5,951)	
	12824	3.0.04)		,,	$ 5,445)	
	12825	3.2.21)		,,	$ 6,173)	
	12826	3.0.20)		,,	$ 5,625)	
	12827	3.1.02)		15.8.66	$ 5,816)	
	12828	3.2.30)		30.4.66	$ 6,637)	
	12829	5.0.25)		15.8.66	$ 8,508)	
	12830	4.3.29)		25.5.66	$ 8,630)	
	12831	4.2.04)		30.4.66	$ 8,145)	
	12832	5.0.27)		,,	$ 9,304)	
	12833	4.1.10)		,,	$ 7,762)	
	12834	5.0.39)		30.3.66	$ 9,438)	
			$ 39,945		$87,436	+$47,491
1961	8023 (28/48th share)	2.0.12				
1963	2235	3.0.21	$ 1,800	16.4.66	$12,000	+$10,200
	1353 (part)	44.10 ac.	$ 50,000	20.3.66	$97,000	+$47,000
1966	Menteri Estate 3 portions	190.7 ac.	$149,081			
1968	Columbia Est. (part)	49.18 ac.	$ 24,590			

It is in respect of the profits arising from the sale of the 15 lots of land which were sold in 1966 that the dispute in this case arose. The taxpayer contended and still contends that they represented capital appreciation. Revenue maintained that they were profits arising from the purchase and sale of land in the course of dealing with lands and therefore assessable to income tax.

The figure assessed to tax by the Comptroller-General was $105,340. The difference between the purchase prices and the sale prices was $107,957, as the Special Commissioners noted in their grounds of decision. No objection being taken to the figure adopted by Revenue, the Special Commissioners in their decision confirmed the assessment at this figure. No objection would understandably be made by the taxpayer for the lower figure and the dispute in the form it comes before me is over this figure. I must necessarily decide this case on this sum.

On these facts, the Special Commissioners held that this sum was assessable to tax. Their grounds of decision were so succinct as to be quotable in their entirety:

"By 1960 the appellant, who was experienced in rubber holding, bought extensive rubber lands indiscriminately. In 1960 he purchased one lot with middle-aged trees and 12 lots with trees which could only be tapped for no more than another 5 years. In 1963 he purchased one lot with young trees, some of which were tappable and some untappable, and another lot with old trees. Within this short period of 6 years he bought and sold the same 15 pieces of land. Some of these lands were held by him for only about 3 years. These are not isolated transactions in land and we are of the opinion that the appellant was dealing in them as we hold that they were not acquired for investment."

To the Special Commissioners the case seemed, for the short reasons they had given, to be too clearly a case of trading in land. If to them the reasons were so obvious that they could be condensed in the one paragraph in which they were contained, learned

Federal Counsel was not so terse or brief. He submitted for consideration the circumstances relating to (a) the nature of the asset, (b) the circumstances of the purchase, (c) the vocation of the taxpayer, (d) the number of like transactions into which the taxpayer has entered in relation to his total investment capital, (e) the length of the time the property was held and (f) the circumstances of the sale.

On the first three, Federal Counsel contended that the facts found established that the taxpayer had considerable experience in rubber-tapping and had only embarked on the business of a sundry-shop keeper in 1952 after his initial purchases of two lots (lots 2156 & 2157) in 1951. Especially, the fact that the trees on the lands in question were of some considerable age meant that he could not be buying the lands for investment. The last circumstance showed that the income to be derived was not commensurate with the outlay. Federal Counsel therefore submitted that on these considerations, the taxpayer had acquired the lands not solely for the income from the trees but with the intent of reselling at a profit.

Federal Counsel further submitted that the purchase in 1963 of part of Lot 1353 (one of the lots concerned) of an area of 44.10 acres for $50,000 when the trees were all old must mean that the purchase was for resale. It was buying "uneconomic lots" for sale at higher prices.

Another lot concerned was Lot 2235 which was said to be full of lallang and undergrowth, with trees of "varying sizes, some tappable and some not." This land was sold at an enormous profit, for a housing development site.

As for the 12 lots purchased from Rengasamy Pillai, Federal Counsel instanced the refusal to replant and the admission that the taxpayer intended to exchange these lots for another piece as indicating a clear intent to sell, when a proposed road was driven through which would enhance the value of the lands. In respect of these lots, the taxpayer made a profit of $49,491.

On the transactions, Federal Counsel stressed what appeared on the record, that this was not a case of an isolated transaction. For the year of assessment 1967, fifteen lots were sold and it was also contended that the appellant did not hold these lands for very long periods of time. That fact was consequently significant of land transaction.

If I may so put it without intending any disrespect whatsoever, these arguments are not, in my view, entirely conclusive. Recognition must be had of the difference in the management of rubber estates between corporations and rubber companies on the one hand and smallholders. In the case of the latter, it was very much a case of tapping of such of the trees as were capable of producing latex. Replanting was a matter not of planned operations but dependent on the resources available and on the availability of replanting grants. It was not unknown for smallholders after exhaustion of the trees, to hold rubber lands which were completely unproductive.

Insofar as Lot 2235, said to be near the main road and near to the Ayer Tawar New Village was concerned, the mere fact that such factors enabled the appellant to make a profit of some $12,000 did not, *per se*, make the profits liable to tax: see *E.* v. *Comptroller-General of Income Tax.*[1] It would be caught only if in all the circumstances of the case the taxpayer was found to be trading in land.

Also, I do not myself consider that the mere chance of enjoying a road driven by the Government through or near the 12 lots of land purchased in the fragmentation of an estate in 1960, without the taxpayer doing anything positive to enhance the value of the lands or to convert and exploit the lands as a building site has anything to do with the true nature of his land holding.

On the significance of multifarious transactions, I am prepared to accept that a number of transactions may well stamp the transactions as dealing in land but in my view, this is only one of the factors to be taken into consideration. It cannot, *per se*, stamp the nature of the holding indelibly as trading. In this connection this passage from Rowlatt J.'s judgment in *Pickford* v. *Quirkes*,[2] at page 263 is of particular significance

> "Now of course it is very well known that one transaction of buying and selling a thing does not make a man a trader, but if it is repeated and becomes systematic, then he becomes a trader and the profits so long as they remain isolated, become taxable as items in a trade as a whole, setting off losses against profits and combining them all into one trade."

The emphasis I would put would be on "trade as a whole" and "one trade."

In *MacMahon & MacMahon* v. *Commissioners of Inland Revenue*,[3] the appellants were 2 sisters who between 1942 and 1948, jointly purchased and sold 2 dwelling-houses (one of which they sub-divided before sale) and a block of property comprising an hotel licensed premises and shops. They lived in two of the properties while in ownership. They were held to be carrying on an adventure in the nature of trade.

Turning our attention to the facts of the taxpayer's purchases and sales, we will see that he still keeps the two lots he purchased in 1951 and the one in 1956, that of the fifteen lots he bought in 1960, he sold fourteen after 6 years of holding, all fourteen being from fragmentation, and that he sold the 2 lots purchased in 1963, also in 1966. He still kept the undivided share in Lot 8023, bought in 1961. Now, and this, to my mind, is a matter of some significance, lost sight of, with respect, by the Special Commissioners, he very evidently as a cursory glance of the table of purchases and sales I have prepared earlier on will show, sold the lands he did sell in 1966, all, with the exception of 3 lots, lots 12827, 12829, 12830, within a space of one month, from 30 March to 30 April, and the other 3 lots were sold, one in May and the other two in August. At about this time, he was negotiating for the purchase of the three portions of Menteri Estate in Pahang, which he eventually bought in August 1966.

It is to my mind clear that what the appellant did was to sell and invest the proceeds in other pieces of land.

The sale of the lands in question within a very short space of time for the clear purpose of reinvestment must in the circumstances of this case take away any significance of multiple transactions.

It also seems to me that the experience which the Special Commissioners imputed to the appellant in rubber-holding was a different matter from experience in land-trading.

It will I think be well to bear in mind what Farwell L.J. said in *Hudson's Bay Co.* v. *Stevens*[4] at page 438.

"Land-owning is not a trade and it would be an enormous deterrent to that free dealing with land which the Common Law has for centuries regarded as of the greatest importance for the public weal, if the vendor were to be charged with income tax on all or any part of the purchase money of the land sold by him."

and what was said in the joint judgment of Rich, Dixon and Evatt JJ. in *Evans* v. *F. C. of T.*[5] at 99 cited in Commonwealth Taxation Board of Review No. 2 in 9 C.T.B.R. (N.S.) case 102:

"It is concerned with the well-known difference between enlargement of capital by sale of capital assets and obtaining detachable profit by buying and selling assets. The purpose for which it speaks is the *dominant purpose* actuating the acquisition of the assets — the use of which they are to be put."

In the circumstances of the facts as found by the Special Commissioners and drawing the reasonable inferences from them, at the very best, from the point of Revenue, the sale of the lands in 1966 for re-investment in the same kind of lands in the same year is an adventure in the nature of trade. But I am of the opinion, with respect, that the sale was a sale of capital assets and the difference an appreciation, which at law is not caught by tax.

The appeal is therefore allowed with costs.

Appeal allowed.

OOI AI SENG v. CHAN LIN LAM

[F.C. (Azmi L.P., Suffian & Ong Hock Sim F.JJ.)

April 1, 1973]

[Penang — Federal Court Civil Appeal No. 62 of 1972]

Landlord and Tenant — Tenancy agreement — Construction of wooden shed on land — Limited expenditure of money — Duration of tenancy — Equity — Equitable estoppel — Protection of tenant's occupation.

The plaintiff had entered into a tenancy agreement in December 1958 with the defendant's father. The agreement was that the plaintiff was to rent out a portion of his land for the tenant to construct a wooden shed. The defendant was recognised as the new tenant upon his father's death. In May 1966, the plaintiff issued a notice to the defendant to vacate the land within one month. When the defendant failed to do so the plaintiff brought the present suit. The defence was that the defendant had an equitable interest coupled with a tenancy or licence and hence he was entitled to stay as long as he liked. The plaintiff's claim was dismissed by the Sessions Court and the High Court and plaintiff appealed to the Federal Court.

Held, allowing the appeal: if there was anything at all suggesting the duration of the tenancy, the very nature of the construction of the wooden shed would indicate a tenancy of a temporary nature. It could not be said therefore that there had arisen an equity or equitable estoppel protecting the tenant's occupation of the land.

Cases referred to:-

(1) *Ramsden* v. *Dyson* (1866) L.R. 1 H.L. 129.

(2) *Devi* v. *Francis* [1969] 2 M.L.J. 169.

(3) *Plimmer* v. *Mayor, Councillors and Citizens of the City of Wellington* (1884) 9 App. Cas. 699.

(4) *Inwards* v. *Baker* [1965] 1 All E.R. 446.

(5) *Khew Ah Bah* v. *Hong Ah Mye* [1971] 2 M.L.J. 86.

(6) *Siew Soon Wah & Ors.* v. *Yong Thong Hong* [1973] 1 M.L.J.

(7) *In re King's Lease-hold Estates* (1873) L.R. 16 Eq. 521.

(8) *Kusel* v. *Watson* (1879) 11 Ch. D. 229.

FEDERAL COURT.

Lim Kean Chye and *A. Jayadeva* for the appellant.

Tan Seng Jin for the respondent.

Azmi L.P.: This is an appeal against the judgment of the High Court at Alor Star dismissing an appeal against the judgment of the Sessions Court. The facts may be briefly stated as follows: —

The plaintiff is the owner of a piece of land in Kedah. On 18th December 1958 he rented part of this land to one Chan Swee Kow and the terms of the tenancy are set out in a Chinese document obviously made by the parties themselves and its translation reads as follows: —

"This tenancy agreement is executed between Ooi Ai Seng (hereinafter referred to as landlord) and Chan Swee Kow (hereinafter referred to as tenant) on 18th December, 1958 both parties must strictly follow the terms as mentioned below:

(1) the landlord agrees to rent out a portion of his land in Tokai, Kedah (as shown in the plan) to the tenant.

(2) the tenant can only construct a wooden shed on the abovementioned land.

(3) the wooden shed constructed by the tenant must be near the house No. 136.

(4) the tenant must leave a space of 20 feet in width beside the house No. 130 for the road.

(5) the tenant must leave a space behind the shed for the back lane, the width shall be in accordance with the rules of Town Council. (In front of houses No. 132 and 134).

(6) the rental for the shed is $6 per month.

(7) the tenant must settle the rent at the beginning of every month."

Chan Swee Kow died in 1965 and his son the defendant in this suit, took over the tenancy and was recognised by the plaintiff as the new tenant. In May 1966, the plaintiff wishing to have the rented portion of the land in question for his own purpose issued a notice to the defendant to vacate the land within a month. The defendant failed to do so. On 23rd January 1972 the plaintiff brought the present suit in the Sessions Court for the removal of the shed and for delivery of vacant possession of the land in question. The defendant, however, contended that the notice to quit was bad in law and that he was entitled to the timber shed and to stay on the said land both on legal and equitable grounds and also that he would raise the